

BIG DATA AND COMPETITION POLICY

MAURICE E. STUCKE
ALLEN P. GRUNES

OXFORD
UNIVERSITY PRESS

CONTENTS

<i>Abbreviations</i>	xiii
<i>Table of Cases</i>	xv
<i>Table of Legislation</i>	xix

1. Introduction

A. Myth 1: Privacy Laws Serve Different Goals from Competition Law	1.07
B. Myth 2: The Tools that Competition Officials Currently Use Fully Address All the Big Data Issues	1.11
C. Myth 3: Market Forces Currently Solve Privacy Issues	1.12
D. Myth 4: Data-Driven Online Industries Are Not Subject to Network Effects	1.17
E. Myth 5: Data-Driven Online Markets Have Low Entry Barriers	1.18
F. Myth 6: Data Has Little, If Any, Competitive Significance, Since Data is Ubiquitous, Low Cost, and Widely Available	1.20
G. Myth 7: Data Has Little, If Any, Competitive Significance, as Dominant Firms Cannot Exclude Smaller Companies' Access to Key Data or Use Data to Gain a Competitive Advantage	1.22
H. Myth 8: Competition Officials Should Not Concern Themselves with Data-Driven Industries because Competition Always Comes from Surprising Sources	1.24
I. Myth 9: Competition Officials Should Not Concern Themselves with Data-Driven Industries Because Consumers Generally Benefit from Free Goods and Services	1.26
J. Myth 10: Consumers Who Use these Free Goods and Services Do Not Have Any Reasonable Expectation of Privacy	1.28

I THE GROWING DATA-DRIVEN ECONOMY

2. Defining Big Data

A. Volume of Data	2.04
B. Velocity of Data	2.11

C. Variety of Data	2.16
D. Value of Data	2.19
3. Smartphones as an Example of How Big Data and Privacy Intersect	
A. Why the Odds Favoured the Government in <i>Riley</i>	3.05
B. The Surprising Unanimous Decision	3.14
C. Reflections	3.21
4. The Competitive Significance of Big Data	
A. Six Themes from the Business Literature Regarding the Strategic Implications of Big Data	4.02
B. Responding to Claims of Big Data's Insignificance for Competition Policy	4.14
C. If Data is Non-Excludable, Why are Firms Seeking to Preclude Third Parties from Getting Access to Data?	4.27
D. The Twitter Firehose	4.29
E. The Elusive Metaphor for Big Data	4.32
5. Why Haven't Market Forces Addressed Consumers' Privacy Concerns?	
A. Market Forces Are Not Promoting Services that Afford Great Privacy Protections	5.02
B. Why Hasn't the Market Responded to the Privacy Concerns of So Many Individuals?	5.11
C. Are Individuals Concerned About Privacy?	5.13
D. The Problem with the Revealed Preference Theory	5.15
E. The Lack of Viable Privacy-Protecting Alternatives	5.24
<p>II THE COMPETITION AUTHORITIES' MIXED RECORD IN RECOGNIZING DATA'S IMPORTANCE AND THE IMPLICATIONS OF A FEW FIRMS' UNPARALLELED SYSTEM OF HARVESTING AND MONETIZING THEIR DATA TROVE</p>	
6. The US's and EU's Mixed Record in Assessing Data-Driven Mergers	
A. The European Commission's 2008 Decision Not to Challenge the TomTom/Tele Atlas Merger	6.03
B. Facebook/WhatsApp	6.15

C. FTC’s ‘Early Termination’ of Its Review of the Alliance Data Systems Corp/Conversant Merger	6.49
D. Google/Nest Labs and Google/Dropcam	6.65
E. Google/Waze	6.75
F. The DOJ’s 2014 Win against Bazaarvoice/PowerReviews	6.93
G. Synopsis of Merger Cases	6.104

**III WHY HAVEN’T MANY COMPETITION
AUTHORITIES CONSIDERED THE IMPLICATIONS
OF BIG DATA?**

7. Agencies Focus on What Is Measurable (Price), Which Is Not Always Important (Free Goods)	
A. The Push Towards Price-Centric Antitrust	7.04
B. What the Price-Centric Approach Misses	7.12
C. The Elusiveness of Assessing a Merger’s Effect on Quality Competition	7.16
D. Why Quality Competition is Paramount in Many Data-Driven Multi-Sided Markets	7.20
E. Challenges in Conducting an SSNDQ on Privacy	7.28
F. Using SSNIP for Free Services	7.41
G. How a Price-Centric Analysis Can Yield the Wrong Conclusion	7.45
H. Reflections	7.51
8. Data-Driven Mergers Often Fall Outside Competition Policy’s Conventional Categories	
A. Categorization of Mergers	8.02
B. Belief that Similar Products/Services Compete More Fiercely than Dissimilar Products/Services	8.08
C. Substitutability of Data	8.22
D. Defining a New Category	8.31
9. Belief that Privacy Concerns Differ from Competition Policy Objectives	
A. Defining Privacy in a Data-Driven Economy	9.02
B. Whether and When There Is a Need to Show Harm, and If So, What Type of Harm	9.04
C. How Should the Competition Agencies and Courts Balance the Privacy Interests with Other Interests?	9.14

D. Courts' Acceptance of Prevailing Defaults, in Lieu of Balancing	9.21
E. Setting the Default in Competition Cases	9.31
F. Conclusion	9.39
IV WHAT ARE THE RISKS IF COMPETITION AUTHORITIES IGNORE OR DOWNPLAY BIG DATA?	
10. Importance of Entry Barriers in Antitrust Analysis	
A. Entry Barriers in Data-Driven Markets	10.03
B. Looking Beyond Traditional Entry Barriers	10.06
11. Entry Barriers Can Be Higher in Multi-Sided Markets, Where One Side Exhibits Traditional Network Effects	
A. Traditional Network Effects in Facebook/WhatsApp	11.04
B. The Commission's Reasoning Why the Merger Was Unlikely to Tip the Market to Facebook	11.11
C. Strengths and Weaknesses of the Commission's Analysis of Network Effects	11.17
12. Scale of Data: Trial-and-Error, 'Learning-by-Doing' Network Effects	
A. Waze's Turn-by-Turn Navigation App	12.03
B. Search Engines	12.07
C. Facebook	12.27
D. Reflections	12.31
13. Two More Network Effects: Scope of Data and Spill-Over Effects	
A. Scope of Data	13.01
B. Spill-Over Effects: How Networks Effects on One Side of Multi-Sided Platforms Can Increase Market Power on the Other Sides	13.10
14. Reflections on Data-Driven Network Effects	
A. Ten Implications of Data-Driven Network Effects	14.03
B. Why Controlling the Operating System Gives the Platform a Competitive Advantage Over an Independent App	14.20
C. Independent App Developers' Dependence on Google and Apple	14.29
D. How Google Benefits from These Network Effects	14.32
E. Domination is not Guaranteed	14.40

15. Risk of Inadequate Merger Enforcement	
A. The Prediction Business	15.02
B. Most Mergers are Cleared	15.06
C. The Big Mystery: How Often Do the Competition Agencies Accurately Predict the Mergers' Competitive Effects?	15.11
D. The <i>Ex-Post</i> Merger Reviews Paint a Bleak Picture	15.17
E. The High Error Costs When the Agencies Examine Only One Side of a Multi-Sided Platform	15.20
F. How Data-Driven Mergers Increase the Risks of False Negatives	15.32
 16. The Price of Weak Antitrust Enforcement	
A. The Chicago School's Fear of False Positives	16.02
B. The United States as a Test Case of Weak Antitrust Enforcement	16.10
C. Costs of Weak Antitrust Enforcement in the Agricultural Industry	16.15
D. Costs of Weak Antitrust Enforcement in the Financial Sector	16.22
E. Consumers' Overall Welfare	16.45
F. Why Ignoring Big Data Will Compound the Harm	16.51
G. The Competition Agencies Cannot Assume that Other Agencies will Repair Their Mistakes	16.58
V ADVANCING A RESEARCH AGENDA FOR THE AGENCIES AND ACADEMICS	
17. Recognizing When Privacy and Competition Law Intersect	
A. Promoting Consumers' Privacy Interests Can Be an Important Part of Quality Competition	17.03
B. Some Simple Examples Where Privacy and Competition Law Intersect	17.08
C. Looking Beyond Privacy's Subjectivity	17.14
D. Developing Better Economic Tools to Address Privacy	17.19
E. Why Competition Policy Does Not Have an Efficiency Screen	17.27
F. Using a Consumer Well-Being Screen	17.30
G. Media Mergers as an Example of a Consumer Well-Being Screen	17.36
H. Conclusion	17.40

18. Data-opoly: Identifying Data-Driven Exclusionary and Predatory Conduct	18.03
A. In False Praise of Monopolies	18.03
B. Debunking the Myth that Competition Law is Ill-Suited for New Industries	18.08
C. How the ‘Waiting for Dynamic Competition’ Argument Ignores Path Dependencies	18.14
D. How (Even Failed) Antitrust Enforcement Can Open Competitive Portals	18.20
E. The Nowcasting Radar—Why Some Data-opolies are More Dangerous than Microsoft in the 1990s	18.28
F. Keeping the Competitive Portals Open	18.33
G. An Object All Sublime, the Competition Authority Shall Achieve in Time—to Let the Punishment Fit the Crime	18.65
19. Understanding and Assessing Data-Driven Efficiencies Claims	
A. Efficiencies Benefit Consumers	19.04
B. Efficiencies Must Be Merger-Specific	19.10
C. Efficiencies Must Be Verifiable	19.19
D. Balancing Efficiency and Privacy	19.21
E. Challenges Ahead	19.28
20. Need for Retrospectives of Data-Driven Mergers	
A. Waiting for the Right Data-Driven Merger	20.04
B. Debiasing Through <i>Ex-Post</i> Merger Reviews	20.08
C. FTC’s Retrospectives of Hospital Mergers	20.14
D. The Benefits in Conducting Merger Retrospectives	20.24
21. More Coordination among Competition, Privacy, and Consumer Protection Officials	
A. Moving Beyond Notice-and-Consent	21.06
B. Several Preconditions to Spur Privacy Competition	21.11
22. Conclusion	335
<i>Index</i>	339